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SUPREME COURT OF THE UNITED STATES

AUSTIN WALRATH,

Appellant,

VS.

CHAMPION GOLD MINING CO.,

Appellee.

APPELLANT'S REPLY BRIEF.

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IN THE
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APPELLANT'S REPLY BRIEF.

The Act of Congress of May 10th, 1872, granting to the locator of mining locations theretofore made all veins apexing within the surface lines of their locations, is, so far as this controversy is concerned, to be construed the same as though the grant had been made solely and individually to the Providence Company.

By the terms of the grant, the grantees were to have the exclusive right to the possession and enjoyment of all veins apexing within their surface lines, and of all such outside parts of such veins as lie between vertical

planes drawn downward "through the end lines of their location" extended in their own direction.

The appellee's whole case rests upon the meaning of that last phrase.

We must bear in mind that the many sided location of the Providence was entirely valid under the law of 1866. We must also suppose that Congress knew of the form of the location then owned under the Providence patent, and knew, also, that it was possible that other veins than the Granite would be thereafter discovered running in different directions and crossing other lines than did the Granite. Then, to support the appellee's contention, it must be held that, under all these circumstances, when Congress used that phrase "end lines of their locations" it meant the lines g-h and a-p, and those lines alone.

It is impossible to believe that such is the case. In so large a location—containing over thirty-three acres—it was not only possible, but probable, that other veins would be found running in other directions than the Granite, and that would neither cross such lines nor even touch their vertical planes anywhere, and where it would be impossible that they should constitute end lines.

Again, as shown in our original brief (page 24), this Court has held, time and again, that that phrase does not refer to any particular surface line of the location, but to the line that subsequent development shows the vein actually crosses. Here it is found that the Contact vein actually crosses the line f-g, and consequently that line, as to that vein, becomes the end line of the location.

Appellee's learned counsel argues (appellee's brief, page 12), that we have misunderstood the decision of the Circuit Court of Appeals, and that said Court did not intend that the line g-h should also be extended west of g as well as east of it.

If it did not we are entirely unable to understand the meaning of the language used. The Court first said: "In so far as the decree appealed from limits the extralateral right of the complainant to follow the vein called, in the record, the Back or Contact vein, in its downward course by the line f-g, running South, 43 degrees west, extended vertically downward, it is erroneous and should be modified. The Court below correctly found and adjudged the end lines of the Providence claim, under which the complainant claims, to be the lines a-p and g-h; and, further that they are the *true and only end lines of each and every vein, lode, or ledge found within the surface location of the Providence claim.*

Certainly the trial Court did not attempt to limit any extralateral right of the complainant by the line f-g, except that between where the line crossed the apex of the vein and g, and as showing that this was what the Court had in mind, it added: "It should be bounded by vertical planes drawn downward through the end line g-h, running south 73 degrees west, and through the end line a-p, extended indefinitely in their own direction, *subject to the condition that the complainant has no right to enter upon the surface of the respondent's claims.*"

As respondent's claims do not extend east of g, this language must refer to the surface of its claim imme-

diately across the line f-g, and west of g. But if complainant was not to cross the vertical plane of the line f-g at all, nor go into respondent's claim anywhere, why provide he should not enter upon the surface? We submit that the only construction that can be placed upon this language is that the line g-h was to bound complainant's extralateral rights in the vein beneath the surface of the New Year's claim west of g, and that consequently we have not misconstrued the decision of that learned Court.

We feel the more sure of this because the principle upon which it is based, that the lines g-h and a-p are the only end lines of the location, leads inevitably to the conclusion that such must have been the intention.

In seeking to show our misinterpretation, counsel also says that it was in the light of the geological fact existing in the case, that the vein dips away from the line f-g. that g-h was fixed as the only end line of that end of the location.

He certainly does not mean that the geological facts existing in this case justify the establishment of the general principle that the same line must constitute the end line of every vein found within the location, while a different geological condition would not; that this principle applies to the Contact vein, while if it dipped in some other direction, or crossed some other line, it would not?

Congress, in using the term "end lines of their location" either meant the line called the end line of the location, no matter in what direction the vein in controversy might run or dip, or else it meant the line actually crossed by that vein.

It certainly was not intended to have one meaning in one case, and a different meaning in another case.

If in this case it meant the line g-h, then that line became the end line, no matter what the geological condition might subsequently be found to be, but, as it is utterly absurd to suppose that line could have been the one intended, under some conditions shown and illustrated in our original brief, page 32, et seq., it follows that such could not have been the intention in any case where the subsequently discovered vein did not cross that line.

Counsel says (page 12), "Should the vein on its downward course by some freak of Nature change and dip in an opposite direction, the modification might become effective, otherwise it is a mere abstraction."

That is, should it make this turn, the line g-h would apply where, on its dip, it passed under the New Year's Extension location, 1500 or 2000 feet beneath the surface, but that it would not apply to the surface, nor anywhere above where the vein first passed under g. Now, we are not contending that it would, or that it should, because we believe it should not, but that f-g should be held to be the only end line both at the surface and below, but we do say that if it applies at all, and g-h is the only end line to that end of the Contact vein, then it should be the end line above g as well as below, and that it should be extended west from g across the apex. As this is manifestly inadmissible, it shows that g-h is not, anywhere, the "end line of their location" as to the Contact vein.

Counsel also says that under the decisions the line f-g performs merely the function of a side line. What are the functions of a side line which crosses a vein? To this query he answers, on page 23, that such a line performs the function of an end line to the extent of stopping farther pursuit of the vein on its strike. He calls f-g a side line, but he admits that to some extent it constitutes an end line of the Contact vein. This is correct, and we add it constitutes an end line, not only as to the surface, but is certainly, under the terms of the law, to be extended downward vertically. Counsel must also admit this. In fact, he contends that it does constitute an end line of this vein as far as g. Where the vein passes under g, we will say, it has reached a depth of 300 feet. Then for 300 feet on the dip of the ledge f-g is not a side line, but a true end line. This is not in accordance with the decision of the Court of Appeals, but is admitted by counsel, and we believe is correct.

But at g counsel stops. The statute provides that the end line is to be extended indefinitely in its own direction, but counsel says only until it reaches g-h (which we contend is merely a side line of the vein), and there he makes an angle of about thirty degrees.

It seems to us that this position is unquestionably untenable. If it becomes an end line at all, it is, under the law, to be extended indefinitely in its own direction, and to divide outside parts of the vein as well as inside parts.

We respectfully call attention to the fact that counsel did not originally admit that f-g constituted an end line

for any purpose. His original contention was, that there should be a new end line drawn through v-v' (see page 10 of his brief), but the decision in *King vs. Amy & Silversmith*, 152 U. S. 228, that the courts could not create an end line for a locator, was fatal to this contention, and he has fallen back upon a defense of the position taken by the Courts below, that g-h is the only end line, which as it seems to us, is not near as logical nor as tenable as is his own. Even yet he occasionally relapses towards his original position. (See bottom of page 36 and page 37 of his brief, where he still contends that instead of treating the side line as an end line, where the vein crosses it, a new end line should be drawn by the "application at the point of departure from the side line of the plane of the end line of the location." This, of course would be v-v'.)

Suppose it had been found, after the passage of the Act of 1872, that the Granite vein did not cross g-h, but either stopped short of that line, or turned and crossed f-g. We suppose counsel would not argue that g-h would still remain the only end line of the location. Under the *Flagstaff* and other cases it would not in such case be the end line of any vein, much less of the *Contact*; but if, in the Act of 1872, Congress referred to that line when it spoke of the "end lines of their location," then it would remain the line intended without regard to the subsequently discovered course of the vein.

Again, suppose that g-h, instead of running from g to h had been located nearly south from g to o—substantially parallel with the *Contact*—and crossing the Granite vein between those points. It would then be as

much the end line of the Granite as it is now. Would it still remain the end line of the Contact? Would the Champion be entitled, under its location, to all the ore lying east of that line? Most certainly not, and if it would not in that case, then it is not now. As to the Contact vein, g-h would then be no more a side line than it is now. The only function that it now performs as to that vein is that of a side line, and a side line never stops the pursuit of the vein on its dip.

On page 24, counsel quotes from the opinion of the Circuit Court as follows: "Complainant's contention would take the back or Contact vein outside of the plane of the northerly end line of the Providence drawn downward vertically, and give to him extralateral rights not granted by the patent, nor given to him by the granting provisions of the Act of 1872."

We submit that this statement begs the whole question in dispute. If f-g is the end line of the Contact, then, and, as to that vein, g-h, is not the end line of the Providence location, but it becomes as to that vein merely a side line, and our contention does not "take the vein outside the end line, nor give us extralateral rights not granted by the patent, nor given by the Act of 1872."

Counsel argues (pages 25 and 26), that in extending the lines g-h and a-p westward, in our Figure 9, page 34, we misinterpret the decree of the Court below, because that Court did not intend these lines to be extended west. We have already answered that proposition, but, in regard to Figure 9, we wish to say that it was drawn simply to illustrate the argument that the doctrine that lines g-h and a-p constitute the only end lines of the

Providence location, and consequently the end line of every vein found crossing any of its lines, is entirely untenable.

While, owing to the fact that the Contact vein happens to dip to the east, there are, and can be, no portions of it on its downward course to the west of the Providence, that fact is entirely immaterial. It might have dipped to the west, but if the principle that g-h and a-p are the only end lines of the Providence location is correct then those lines must be made to apply to every situation that might exist, including the imaginary one illustrated in Figure 9, where the Contact vein is supposed to dip, just as it really does, to the east. We regret that counsel has not given us his ideas as to the proper solutions of the problems presented in our Figures 9 and 10, and on pages 33-35, of our first brief, under his theory that g-h and a-p are the only end lines.

In this connection we wish to add that as a matter of fact the Contact vein does not cross the line f-e at all, although, so far as the evidence showed at the time of the trial, it had only been traced as far south as x, leaving the presumption in force that it extended on through the location.

Lindley on Mines, sec. 615.

The assumption in figure 9 that it did cross that line was made only for the argument.

Counsel is mistaken in saying that we cite the cross-lode cases of *Wilhelm vs. Silvester*, 101 Cal. 358, and *Watervale vs. Leach*, 33 Pac. Rep. 418, as to that portion of the vein lying beneath the parallelogram h-i-k-h.' We cited them to refute his argument that there can be but

one end line to a location, no matter how many veins may be found therein, or in what direction they run. (See our opening brief, page 39.) And for that purpose we claim them to be very much in point. In those cases it was held, notwithstanding the location already had one vein running lengthwise of the location, with, of course, an end line for each end of that vein, that the location would also hold the cross vein. Veins do not run upon the surface of the earth, but beneath the surface, and as the holding was that the location held all of the vein within its surface lines, those lines were necessarily to be extended vertically downward, and hence, as to the cross vein, the side lines constituted true end lines.

That is all we contend for here, for, admitting f-g to be a side line, the same principle would make it, as to the vein which crosses it, an end line, and, if an end line at all, it is, by the express terms of the law, to be extended indefinitely in its own direction along the dip of the vein. It does not seem to us that the fact that there was also in those cases a surface conflict is at all material.

The Parallelogram H-I-K-H'.

We have not been able to exactly understand what claim appellee's learned counsel makes as to the segment of the vein underlying the parallelogram h-i-k-h'. He says (page 35) that the segment is a part of the vein on its strike, and not on its dip. We submit, however, that is dip except what lies precisely at right angles with the strike is not the case, unless it should be held that nothing

strike, which is manifestly not the case. We have treated this question to some extent in our opening brief (page 14), and we also refer to Lindley on Mines, sections 365 and 589, page 719.

There is often a difficulty in determining what is strike and what is dip upon a ledge, but certainly any place on a ledge which comes nearer being perpendicular than horizontal, from a given point on the apex, must be held to be upon its dip. This is the case with the parallelogram in question considered from the point v, where the vein crosses the line f-g at the surface, and consequently it is upon the dip instead of the strike of the ledge.

But whether the ore in the parallelogram is upon strike or dip is immaterial. The law gives the locator absolutely, without regard to end lines or end line planes, or strike or dip, all of every ledge found within his surface lines which also apexes therein.

Counsel also says that his understanding of the rule applicable to our case is presented in section 610 of Lindley on Mines, but turning to that section, we find that the principles there asserted are only applicable to locations made under the Act of 1872, where end lines must be parallel. His illustrations also show that section 610 is based entirely upon the theory of parallelism of end lines. But under the Act of 1866, end lines were not required to be parallel, and the fact that they diverged does not affect the validity of the location. We therefore contend that the doctrine asserted in section 610, whether good or bad, has no application to the case at bar.

We also desire in this connection to call attention to the fact that the New Year's Extension claim has no extralateral rights, because the end lines of the location are not parallel. This is, perhaps, not a very important consideration as to that part of the vein outside the Providence surface lines, because a recovery of that depends upon our own title and not upon appellee's want of title, but, as to this parallelogram, it is quite important, for the reason that this, being within our surface lines, is presumed to belong to us (Lindley on Mines, secs. 551 and 866), and to overcome this prima facie case the appellee must show an apex within his lines and a right to follow the vein into our ground.

We say the end lines of the New Year's Extension are not parallel because the south end line as relocated, is not straight, but makes a turn at or near the point where it crosses the vein. We say this without regard to whether the vein crosses east or west of the point where the turn is made, for we believe that is immaterial.

But, if it makes any difference, then it appears quite clearly from the notice of relocation (see Transcript, page 31) that it was the line f-g that was to constitute the south end of the New Year's Extensions (and not the other line. The notice reads that the location was to begin at the northerly end of the lode in the New Year's Extension ground, and run thence along the lode south "to a point and stake on the northerly line of the Providence Mine, designated as Mineral Lot No. 40, for the South end of said lode line."

And again, the portion abandoned by the same notice of relocation is described as being all that portion "for

surface and lode which lies south of the northern boundary line of said Providence mine"; thus again making f-g the south end line of both lode and surface ground.

As originally located, as shown by Figure 3, that line was straight, and parallel with the other end line, but as that part of it after it crossed the line f-g was on the Providence patented ground, where it had no possible right, it was the same as no line, and at any rate, there is no question that under the relocation, under which appellee now claims its rights, it is not straight nor parallel with the other end line.

The location and patent of the New Year's Extension having been made under the law of 1872, it was absolutely necessary to the existence of rights in a vein outside the surface lines of the location that the end lines should be parallel.

The Iron Silver-Elgin Case, 118 U. S. 196;

See also Lindley on Mines, sec. 365, pp. 475-6, where the cases are cited and illustrated.

Under these circumstances, giving the ore within this parallelogram to the appellee is equivalent to holding that, as against the veriest trespasser, we have no right to the ore found within our surface lines, because we do not own a particular part of the apex of the vein. As against one entirely without title it should make no difference whether we have any apex at all.

Lindley on Mines, sec. 551.

As to this intralimital right the form or shape of our surface location is altogether immaterial.

Id., sec. 553.

We desire also to again emphasize the point that the

question involved here is altogether different from that involved in the case of Del Monte M. & M. Co. vs. The Last Chance, now pending on appeal in this Court from the Eighth Circuit, where, in a location made under the Act of 1872, the vein crosses an end line and a side line of the location.

In Lindley on Mines, sec. 575, it is said that the fact that end lines of a lode diverge in a location made under the Act of 1866, and that consequently the locators will get more of the lode beneath than upon the surface, does not affect the validity of the location, but upon page 38 of his brief he attempts to qualify this statement by saying that it will only apply to the "original" end lines.

Why, if the vein happens to cross the location, as in the Flagstaff case, the same rule should not apply to the new end lines, if they diverge, he does not explain and we can see no reason for any difference.

He also calls attention to the modesty of our claim, under the rule stated in that section, if the vein happened to cross the line f-e. If lines diverge at all, the farther you follow them into the earth the more space will exist between them, but if a small divergence will not affect the validity of a location, we do not see why a greater one should do so. The principle is the same in either case.

Respectfully submitted,

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